86-538

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

ANN HOCKERSMITH

VERSUS

PARTNER PUBLISHING CO., INC., et al

On Appeal From the United States District Court,
Middle District of Louisiana, State of Louisiana,
Honorable Frank J. Polozola, Judge Presiding

APPENDIX

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

Jury Interrogatories

Answer "Yes" or "No"

1. Do you find that Ann Hockersmith was defamed by the publication of the pictures and article of her in Partner Magazine in November, 1980? Yes ✓ No ___

2. Do you find that Ann Hockersmith was defamed by the publication of the pictures and article of her in Game Magazine in November, 1981? Yes ✓ No ___

3. Do you find that Ann Hockersmith's privacy was invaded by the publication of the pictures and article in Partner Magazinne in November, 1980? Yes ✓ No ___

4. Do you find that Ann Hockersmith's privacy was invaded by the publication of the pictures and article in Game Magazine in November, 1981? Yes ✓ No ___

5. Did the publishers act with actual malice in publishing the pictures and article in

(a) Partner Magazine in November, 1980?) Yes ✓ No ___

(b) Game Magazine in November, 1981? Yes ✓ No ___

If your answers to 5(a) and 5(b) were no, proceed to question 9.

If your answer to either 5(a) and 5(b) was yes, answer questions 6 through 8.

6. Do you find that the distributors knew or had reasons to know that the photographs and printed material were defamatory prior to distribution? Yes ✓ No ___

7. Do you find that the distributors acted with actual malice in the distribution of Partner Magazine in November, 1980? Yes ✓ No ___

8. Do you find that the distributors acted with actual malice in the distribution of Game Magazine in November, 1981? Yes ✓ No ___

9. Do you find that plaintiff's right to publicity was violated by

(a) the publishing company? Yes ___ No ✓

(b) the distribution company? Yes ___ No ✓

If your answers to either 5(a), 5(b), 9(a) or 9(b) were yes, please answer the following questions. If all of the answers to 5(a), 5(b), 9(a) and 9(b) were no, you need not proceed any further.

10. Do you find that the publishing companies exercised total actual control over the distributing companies?

Yes ✓ No ___

11. What damages, if any, is plaintiff entitled to recover for the damages?

$ 4,000,000

12. Do you find that Ann Hockersmith contributed to her own damage by consetning to allow her photographs and articles to be used?

Yes ___ No ✓

13. If your answer to No. 12 is Yes, what percentage of fault did Ms. Hockesmith's action contribute to her damage?

Specify percent from 0% to 100%

0 %

Baton Rouge, Louisiana
November 8, 1983

/s/ James M. Baker
Jury Foreman

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MAY 14, 1985
POLOZOLA, J.

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

This case was originally tried to a jury which rendered a judgment in favor of the plaintiff in the sum of $400,000. This matter is now before the Court on several post-trial motions. Plaintiff has moved for alteration of the jury verdict, for a judgment n.o.v., and for reconsideration of this Court's ruling granting a new trial. The defendants have moved for reconsideration of the Court's denial of the defendants' motion for a directed verdict and for judgment n.o.v. No oral argument is required on these motions.

By minute entry of December 2, 1983, this Court granted defendants' motion for a new trial, reserving the right to determine whether a directed verdict or a judgment n.o.v. should be granted. The defendants' motion for judgment n.o.v. was denied by this Court per minute entry of June 26, 1984. The parties have requested the Court to reconsider its earlier rulings. Upon reconsideration of all the

evidence, the Court finds that after viewing the evidence most favorably to the plaintiff and giving plaintiff the benefit of all reasonable inferences from the evidence, the facts and inference point so strongly and overwhelmingly in favor of the defendants that reasonable persons could not render a verdict in favor of the plaintiff.[1] Therefore, for reasons which follow, the Court hereby vacates its order of December 2, 1983, granting a new trial and now orders that a directed verdict and judgment nothwithstanding the verdict be entered in favor of the defendants.

Ann Hockersmith brought this suit against the publishers of Partner and Game magazines, Partner Publishing Co. and Piccadilly Publications, Inc. ("publishers") and the distributors of those magazines, Publishers Distributing Corp. and Flynt Distributing Co. ("distributors"). Plaintiff alleged that she was defamed and her privacy invaded when nude and semi-nude photographs of her were published in the magazines published and distributed by the defendants without plaintiff's knowledge or consent. The defendants contend that they relied on the written model releases[2] signed by plaintiff which were furnished to publishers by Stuart Citrin[3], a freelance photographer from whom publishers purchased the photographs of plaintiff. The defendants further contend that plaintiff is a public person as

to the readership of "girlie" magazines and that there was no evidence of actual malice on the part of the defendants presented at the trial of this case.

After a trial on the merits, the jury returned a verdict in favor of plaintiff in the sum of $400,000. In response to the interrogatories propounded to them, the jury found that both the distributors and the publishers acted with actual malice. This Court is of the opinion, however, that no evidence was adduced at trial which could in any way support a verdict in favor of the plaintiff.

Plaintiff offered no evidence of actual malice on the part of either the publishers or the distributors. When plaintiff allowed nude and semi-nude photos of herself to be published in Penthouse, she "invite[d] attention and comment" to herself.[4] Insofar as the readers of Penthouse and other magazines of that genre are concerned, she became a public figure.[5] Her status as a public figure is further supported by the fact that she was a "Pet of the Month" in the Penthouse magazine and as such enjoyed front cover and center-fold prominence in that issue of the magazine. Thus, she has the burden of proving that the defendants acted with actual malice, i.e., actual knowledge of the defamatory nature of the publication or reckless disregard of the truth. New York Times v. Sullivan, 376 U.S. 254 (1964).

The standard release upon which defendants relied authorized the photographer or his assigns to publish photographs of plaintiff in conjunction with her own or a ficticious name "for any purpose whatsoever, including the use of any printed matter in conjunction therewith."[6] The document further released any firm publishing or distributing the photos from liability as a result of distortion, alteration, or use in composite form of the photos "even should the same subject me to ridicule, scandal, reproach, scorn or indignity."[7] Plaintiff offered no evidence to show that the release was obtained through any fraud or misrepresentation on the part of defendants or that the defendants had any reason whatsoever to doubt the validity of the release. To the contrary, the evidence presented at the trial revealed that the release was a standard form release used in the industry and was presented to the defendants in the ordinary course of business. There was no evidence presented that the defendants knew or should have known of the circumstances under which Citrin obtained the release from the plaintiff. Plaintiff testified that she added the words "For Playboy use only" to the release before signing it, although this addition is not found on the copies of the release introduced at trial. Furthermore, although plaintff contends she limited the use of her photographs to Playboy magazine, it is clear that

plaintiff did not object to having her photographs and the stories used in connection therewith published in Penthouse magazine. In fact, plaintiff testified at the trial that had the photographs and stories which she now complains of been published in Penthouse magazine or any other magazine of a similar nature, she would not have objected. Furthermore, the stories published in Game and Partner contain many excerpts from the stories published in the Penthouse magazine. Taking this evidence in the light most favorable to the plaintiff for purposes of this motion, there is still no evidence of actual malice on the part of the defendants, nor is there evidence that the defendants knew or had reason to know that the release was not valid or had allegedly been altered.

Plaintiff also failed to introduce evidence of actual damage. Plaintiff contended that because of the publication of her photos in defendants' magazines she lost the opportunity to receive approximately $200,000 in cash and prizes which would have been hers had she been selected Penthouse Pet of the Year. However, Jeff Zelmanski, the Pet promotions director of Penthouse, testified that plaintiff's appearance in defendant's magazines had no relation to her not being chosen "Pet of the Year."[8] Zelmanski testified that he prepared a summary on each "Pet

of the Month" to be used in selecting the "Pet of the Year." Since promotional activities constitute a large part of the duties of a "Pet of the Year", a model's participation in promotional activities for Penthouse is included in the summary. This portion of plaintiff's summary was not favorable, Zelmanski testified, because she had cancelled a television interview which had been arranged for her by Penthouse.[9] Additionally, Zelmanski testified that he had no knowledge that plaintiff had appeared in defendants' magazines until he was contacted by an attorney in connection with this lawsuit.[10]

Plaintiff alleged further damage in that she was humiliated by the publication of her photos in defendants' "raunchy" magazines. However, the photographs, poses and written material which appeared in Partner and Game are substantially similar to that which plaintiff voluntarily permitted to be published in Penthouse and the Girls of Penthouse. Plaintiff expressed no shame or humiliation at appearing nude and semi-nude in Penthouse or The Girls of Penthouse. The evidence also revealed that plaintiff had no objection to having her nude photographs taken at an apartment complex while residents of the apartment complex watched the picture-taking session. Furthermore, as noted earlier, plaintiff testified that she would not have objected to



these same photographs and stories which she now complains of being used by Penthouse, Playboy or other magazines of a similar nature.

It is not often that this Court reverses a jury. However, in this case there is absolutely not a scintilla of evidence to support a verdict in favor of the plaintiff and the verdict is clearly contrary to the law. Under these circumstances, the Court must, as the Court has done in this case, set aside the jury verdict. A jury verdict must be based on the law and evidence presented at the trial of the case and cannot be based on any other factors, as was apparently done by the jury in this case. Simply stated, a verdict in favor of the defendants was the only verdict that reasonable men and women could have reached in this case. Since no possible evidence was submitted at the trial which could support the jury verdict, and since the verdict is contrary to the law, the defendants' motion for directed verdict and judgment n.o.v. must be granted. In the alternative, and in the event the Court's decision to grant a directed verdict and judgment n.o.v. be reversed or vacated on appeal, the Court finds that defendants' motion for a new trial should be granted since the judgment is contrary to the clear weight of the law and evidence.[11] Plaintiff's motion to alter the jury's verdict and

for judgment n.o.v. must be denied in view of the Court's decision.

Therefore:

IT IS ORDERED that the Court's ruling of December 2, 1983, granting defendants' motion for a new trial be and it is hereby VACATED AND SET ASIDE.

IT IS FURTHER ORDERED that the motion of defendants for a directed verdict and for judgment nothwithstanding the verdict be and it is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motions for alteration of the jury verdict and for a judgment n.o.v. increasing the jury verdict be and each is hereby DENIED.

Judgment shall be entered accordingly.

_____

UNITED STATES DISTRICT JUDGE

FOOTNOTES

1 The Court has followed the test for judgment n.o.v. originally set forth by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), and most recently followed in Thornton v. Gulf Fleet Marine Corp., 752 F.2d 1074 (5th Cir. 1985).

2 See plaintiff's Exhibits 6, 8, 9, and 10.

3 For reasons which are not clear to the Court, Citrin was not named as a defendant by the plaintiff in this suit.

4 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). See also Vitale v. National Lampoon, 449 F.Supp. 442, 445 (E.D. Pa. 1978).

5 See Time Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971); Vitale v. National Lampoon, 449 F.Supp. 442, 445 (E.D. Pa. 1978).

6 See footnote 2.

7 Id.

8 It should be noted that Zelmanski was called as a witness for plaintiff.

9 Zelmanski depo., pp. 11-15.

10 Zelmanski depo., p.17.

11 Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); F.R.C.P. Rule 50(c); Neely v. Martin K. Elby Const. Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967); Iacurci v. Lummus Co., 387 U.S. 86, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967).

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ANN HOCKERSMITH — CIVIL ACTION

VERSUS — NUMBER 81-965-B

PARTNER PUBLISHING COMPANY, INC., ET AL

JUDGMENT

For the written reasons assigned;

IT IS ORDERED AND ADJUDGED that judgment be entered vacating and setting aside this Court's ruling of December 2, 1985, granting defendants' motion for a new trial.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered granting defendants' motion for a directed verdict and for a judgment notwithstanding the verdict.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered denying plaintiff's motion for alteration of jury verdict and a judgment n.o.v. increasing the jury verdict.

Baton Rouge, Louisiana, May 15, 1985.

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 23, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 85-3319 - Hockersmith vs. Partner Publishing Co.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

etc.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: s/Betty G. Martinez
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3319

ANN HOCKERSMITH,
Plaintiff-Appellant

versus

PARTNER PUBLISHING COMPANY, INC., ET AL
Defendants-Appellees

Appeal from the United States District Court
for the Middle District of Louisiana

May 23, 1986

Before WIDSOM, REAVLEY, and JOHNSON, Circuit Judges.

PER CURIAM:*

Plaintiff Ann Hockersmith, a model, brought this action against the publishers of Partner and Game magazines, Partner Publishing Company and Picadilly Publications, Inc. Plaintiff also sued the distributors of the magazines, Publishers Distributing Corporation and Flynt Distributing

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Company. Plaintiff alleged that she was defamed and her privacy invaded when nude and semi-nude photographs of her were published in the magazines published and distributed by the defendants. The jury returned a verdict generally in favor of the plaintiff, although the jury found that defendants had not violated Hockersmith's right to publicity. On post-trial motions, the district judge entered a judgment notwithstanding the verdict in favor of defendants. See Fed. R. Civ. P. 50(b). The district judge held that plaintiff failed to show that the defendants were at fault in relying on a consent form that plaintiff signed when she posed for the photographs. The district judge also held that the plaintiff had failed to show that the defendants had acted with actual malice.

We affirm the judgment of the district court. Plaintiff contends that the district court erred in relying on the consent form and argues that she intended the consent to extend only to Playboy magazine. However, the copy of the consent form introduced by the plaintiff herself indicates no such limitation. Nor does plaintiff persuade that she showed that the publisher defendants acted with actual malice in relying on the release. See **Wood v. Hustler Magazine, Inc.**, 736 F.2d 1084, 1090-93 (5th Cir. 1984), cert. denied, U.S. __, 105 S.Ct. 783 (1985). Likewise, the record indicates

no basis for plaintiff's contention that this Court should pierce the corporate veil and treat the publisher and distributor defendants as one entity.

Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

June 16, 1986

Mr. C. Lee Dupuis, Clerk
139 U.S. Courthouse
707 Florida Street
Baton Rouge, LA 70801

No. 85-3319 ANN HOCKERSMITH -vs- PARTNER PUBLISHING CO., INC., ET AL, (CA-81-0965-(B)

Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

etc.

Enclosed herewith are the folowing documents:

Copy of the Court's opinion.

Original record on appeal or review. (3 Vols.)

Original exhibits. (1 Env.)

etc.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By:_____
Deputy Clerk

cc: (Letter Only)

Hon. Frank J. Polozola
Mr. Arthur Cobb
Mr. John Gross
Mr. R. Bruce MacMurdo